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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/038,805	12/31/2001	Robert L. Popp	KCC 4773 (K.C. No. 17,181)	2929
321	7590 03/03/2004		EXAMINER BOGART, MICHAEL G	
SENNIGER POWERS LEAVITT AND ROEDEL ONE METROPOLITAN SQUARE 16TH FLOOR ST LOUIS, MO 63102			ART UNIT 3761	PAPER NUMBER 9

DATE MAILED: 03/03/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/038,805

Applicant(s)

POPP ET AL.

Examiner

Michael G. Bogart

Art Unit

3761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 31 December 2001.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-26 is/are pending in the application.
- 4a) Of the above claim(s) 14, 15, 17, 18, 20, 21 and 24 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-13, 16, 19, 22, 23, 25 and 26 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 31 December 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- ☒ Notice of References Cited (PTO-892)
- ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 4-6.
- ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- ☐ Notice of Informal Patent Application (PTO-152)
- ☐ Other: \_\_\_\_\_.

## DETAILED ACTION

### *Election/Restriction*

Applicant's election with traverse of claims 13 and 25 in Paper No. 8 is acknowledged. Applicants traverse this election only on the grounds that claim 1 is generic to the elected claims. The Examiner agrees that claim 1 is generic to claims 13 and 25. The election requirement of January 28, 2004 remains intact.

### *Claim Rejections - 35 USC § 112*

The following is a quotation of the first paragraph of 35 U.S.C. § 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1-13, 16, 19, 22, 23, 25 and 26 are rejected under 35 U.S.C. § 112, first paragraph, as failing to comply with the enablement requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention.

The claims are directed to garments having hook and loop fastener systems which achieve a given shear strength result when a specific test is applied to the fasteners. In support of this, the specification describes the test to be applied to the fasteners. In describing the fasteners themselves, the specification, beginning at page 26, essentially describes a lengthy list of various well known (based on references in the specification) hook and loop fasteners and a wide variety

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of well known materials and means for constructing such fasteners. Unless all of these listed combinations of materials and methods achieve the claimed result, applicants have not specified which combinations of these well know materials in fact achieve the claimed results (e.g., a specific combination of distinct materials, with a specific range of basis weights that in fact achieve the claimed results). Applicants have thus essentially claimed a desired fastener performance result supported by an extensive list of known fasteners and means for making them. There are many variables which will affect the shear strength performance of fasteners. In order to replicate these results, one of ordinary skill in the art would be compelled to mix and match, for example, nonwoven materials of varying basis weights, weave density, materials and construction methods, elastic materials of varying basis weights and construction methods, etc. This constitutes undue experimentation. *United States v. Telectronics, Inc.*, 857 F.2d 778, 785, 8 USPQ2d 1217, 1223 (Fed. Cir. 1988) (“The test of enablement is whether one reasonably skilled in the art could make or use the invention from the disclosures in the patent coupled with information known in the art without undue experimentation.”).

### ***Claim Rejections - 35 USC § 102***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. § 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-13, 16, 19, 22, 23, 25 and 26 are rejected under 35 U.S.C. § 102(e) as anticipated by Popp *et al.* (USPAP 2002/0173767 A1).

Regarding claims 1 and 5-7, Popp *et al.* teach a garment (20) for personal wear, comprising: a body (32) having first and second end regions (22, 24); a mechanical fastening system (80) disposed on the body (32), the mechanical fastening system (80) comprising: a multi-directional stretchable landing member (84, 85) disposed in the first end region (22) and comprising a multi-directional stretchable loop material, the multi-directional stretchable loop material being extensible during use in first and second substantially perpendicular directions and being elastomeric during use in at least one of the first and second directions, and a closure member disposed (82, 83) in the second end region and comprising a hook material adapted to refastenably engage the multi-directional stretchable loop material; wherein the multi-directional stretchable landing member (84, 85) and closure member (82, 83) inherently provide shear strength values of less than 3900, 3500, 3000 or 2500 grams in each of the first and second directions (¶'s 0101, 0102, 0107 and 0116)(Fig. 2).

The garment of Popp *et al.* is considered to inherently perform the claimed test characteristics because it recites identical components from which the fastening system of the instant may be constructed. For example, Popp *et al.* at ¶ 0104 recite hook type fasteners which are the same make and model number as that identified by the present invention at page 22, lines 3-20 as being suitable to meet the performance criteria of the invention. Popp *et al.* ¶'s 0106 and 0108 show that the loop material is the same shape, size and is located at exactly the same position on the garment as that of the present invention indicates at page 23, lines 3-30.

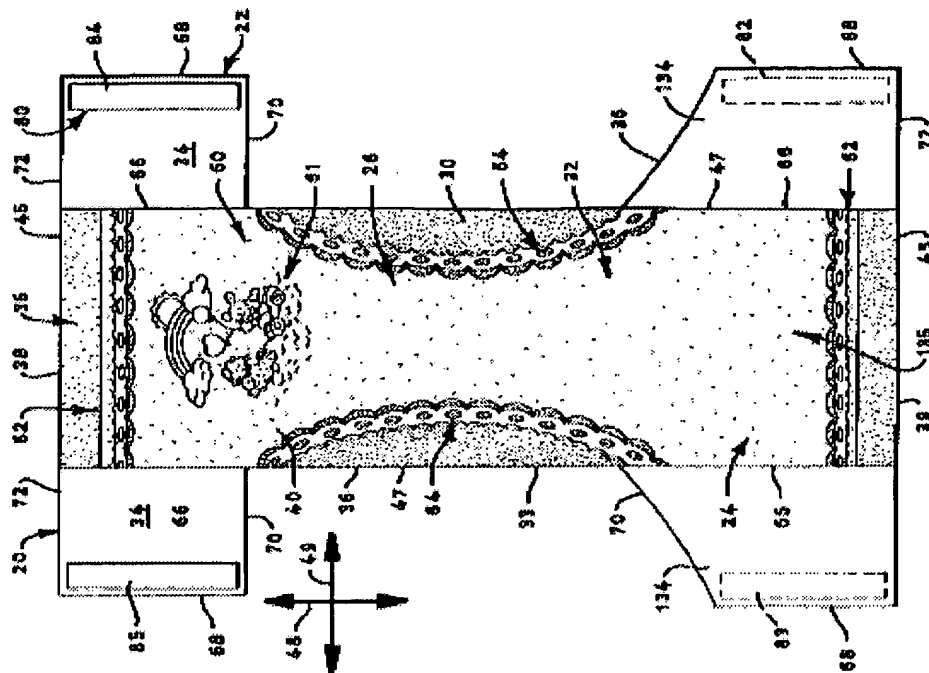


FIG. 2

Popp *et al.* ¶s 0099 and 0107 show that the landing members, which can be of the same material as that of the side panels, is composed of materials indicated by the present invention as suitable for landing members at page 26, line 17-page 32, line 19.

As detailed above in the rejection under 35 USC § 112 ¶ 1, The present invention does specify which combinations of suitable subcomponents described in the specification achieve the claimed results, and which do not. Popp *et al.* therefor expressly teach the claimed invention except for the properties exhibited when it is subjected to certain tests. The claiming of a new use, new function or unknown property which is inherently present in the prior art does not necessarily make the claim patentable. *In re Best*, 562 F.2d 1252, 1254, 195 USPQ 430, 433 (CCPA 1977).

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Regarding claim 2, Popp *et al.* teach multi-directional stretchable loop material that is elastomeric during use in both the first and second directions (§'s 0099 and 0107, which incorporates by reference US Patents which show multidirectional elastomeric properties).

Regarding claim 3, Popp *et al.* teach multi-directional stretchable loop material comprising a nonwoven web stretch bonded to an elastomeric film (§'s 0199 and 0107).

Regarding claim 4, Popp *et al.* teach a multi-directional stretchable loop material comprising a mechanically prestrained composite (§'s 0099 and 0107).

Regarding claim 8, Popp *et al.* teach a hook material (e.g., polypropylene) that is inherently stretchable to same degree (§ 0104).

Regarding claims 9-12, 19, 22 and 23, Popp *et al.* teach a disposable absorbent article (20) for personal wear, comprising: a body (32) having first and second end regions (22, 24) and comprising a liquid permeable inner layer (42), an outer layer (40) in opposed relation with the inner layer (42), and an absorbent layer (44) disposed between the inner layer (42) and the outer layer (40); a mechanical fastening system (80) disposed on the body (32), the mechanical fastening system (80) comprising: a multi-directional stretchable landing member (84, 85) disposed in the first end region (22) and comprising a multi-directional stretchable loop material, the multi-directional stretchable loop material being extensible during use in first and second substantially perpendicular directions and being elastomeric during use in at least one of the first and second directions, and a closure member disposed (82, 83) in the second end region and comprising a hook material adapted to refastenably engage the multi-directional stretchable loop material; wherein the multi-directional stretchable landing member (84, 85) and closure member (82, 83) inherently provide shear strength values of less than 3900, 3500, 3000 or 2500 grams in

each of the first and second directions (§'s 0101, 0102, 0107 and 0116)(Fig. 2)(see discussion of claim 1, above).

Regarding claim 13, Popp *et al.* teach that the multi-directional stretchable landing member (84, 85) comprises a neck-stretched elastic laminate (NBL)(§'s 0199 and 0107).

Regarding claim 14, Popp *et al.* teach a multi-directional stretchable loop material comprising a mechanically prestrained composite (§'s 0099 and 0107).

Regarding claims 16 and 25, Popp *et al.* teach that the landing member (84, 85) comprises side panels of the body (32)( § 0107).

Regarding claim 26, Popp *et al.* teach a hook material (e.g., polypropylene) that is inherently stretchable to same degree (§ 0104).

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael Bogart whose telephone number is (703) 605-1184. The examiner can normally be reached Monday-Friday.

In the event the examiner is not available, the examiner's supervisor, John Calvert may be reached at phone number (703) 305-1025. The fax phone numbers for the organization where this application or proceeding is assigned are (703) 872-9306 for regular communications and (703) 746-3380 for informal communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is (703) 306-0858.



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Michael Bogart

25 February 2004



JOHN B. CALVERT  
SUPERVISORY PATENT EXAMINER  
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